STATE OF MICHIGAN

COURT OF APPEALS

ASPHALT SOLUTIONS PLUS, LLC, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED December 13, 2011
v	No. 301136 Calhoun Circuit Court LC No. 2009-004175-CK
ASSOCIATED CONSTRUCTION OF BATTLE CREEK, INC., Defendant/Counter-Plaintiff-Appellee. and	
BC ADNOH HOLDINGS, LLC, d/b/a BATTLE CREEK HONDA, Defendant-Appellee.	

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Asphalt Solutions Plus, LLC ("Asphalt Solutions") appeals the trial court's order granting summary disposition in favor of Associated Construction of Battle Creek, Inc. ("Associated Construction") and BC Adnoh Holdings, LLC ("BC Adnoh Holdings"). We affirm.

Associated Construction was hired by BC Adnoh Holdings to be the project manager for the remodel of Battle Creek Honda, a car dealership. As the project manager, Associated Construction was responsible for hiring certain subcontractors through a bid process. Asphalt Solutions was awarded the bid for asphalt paving and line marking and a subcontract was signed by Asphalt Solutions and Associated Construction. Over time, BC Adnoh Holdings discovered that there were issues with the water levels and the amount of peat moss underground at the project site. Therefore, BC Adnoh Holdings decided to take over the asphalt portion of the project. A walkthrough of the project site was then performed by BC Adnoh Holdings and Asphalt Solutions to determine what additional paving work would be needed. BC Adnoh Holdings asked that Asphalt Solutions submit a bid for the additional work. BC Adnoh Holdings also requested that Globe Construction submit a bid for the paving work.

Asphalt Solutions sent proposals to BC Adnoh Holdings on two occasions for the additional paving work. It failed to copy Associated Construction or use the process outlined in the subcontract to update the subcontract to include the additional work. One of the proposals included a discount in the price of the originally contracted work. BC Adnoh Holdings decided to use Globe Construction directly for the paving work, so Associated Construction sent a termination letter to Asphalt Solutions for the subcontract.

Asphalt Solutions filed a complaint against Associated Construction and BC Adnoh Holdings. The complaint alleged that Associated Construction breached the subcontract it had with Asphalt Solutions and engaged in concerted activities with BC Adnoh Holdings resulting in damages. The complaint also contended that BC Adnoh Holdings tortiously interfered with the contractual relationship of Asphalt Solutions and Associated Construction.

Associated Construction[1] and BC Adnoh Holdings[2] filed motions for summary disposition. The trial court granted summary disposition[3] in favor of Associated Construction for the breach of contract and concert of action claims. The trial court ruled that there was no triable issue of material fact regarding the validity of the subcontract between Asphalt Solutions and Associated Construction, as the subcontract was abandoned and waived by Asphalt Solutions and was mutually rescinded by Asphalt Solutions and Associated Construction. The trial court also granted summary disposition[4] in favor of BC Adnoh Holdings for the tortious interference and concert of action claims. The trial court reasoned that since the subcontract was not terminated in writing by Associated Construction until after it had been rescinded, there was no contractual relationship with which to tortiously interfere.

Asphalt Solutions argues on appeal that the trial court improperly granted summary disposition in favor of Associated Construction and BC Adnoh Holdings because the subcontract between Asphalt Solutions and Associated Construction was not rescinded through abandonment, waiver or impossibility. We disagree.

While Associated Construction's motion for summary disposition was brought under MCR 2.116(C)(8) and (C)(10), the trial court decided both motions for summary disposition under MCR 2.116(C)(10). "MCR 2.116(C)(10) tests the factual support of a plaintiff's claim."[5] A court must consider "the affidavits, pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party[.]"[6] Summary disposition may be granted under MCR 2.116(C)(10) "if, there 'is no genuine issue as to any material fact, and the

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[1] MCR 2.116(C)(8), (C)(10).

[2] MCR 2.116(C)(10).

[3] *Id.*

[4] *Id.*

[5] *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

[6] *Id.*

moving party is entitled to judgment . . . as a matter of law.'"[7] This Court review's a trial court's decision regarding a motion pursuant to MCR 2.116(C)(10) de novo.[8]

"Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed."[9] Asphalt Solutions submitted a bid to Associated Construction for paving and line marking to be performed for BC Adnoh Holdings. The bid was accepted and a subcontract was prepared and executed by Associated Construction and Asphalt Solutions. Therefore, there was a valid contract between Asphalt Solutions and Associated Construction.

There can be no breach of contract by Associated Construction if Asphalt Solutions abandoned the subcontract. "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted."[10] Abandonment of a contract "may be inferred from the conduct of the parties and the attendant circumstances. A contract will be treated as abandoned when acts of one party, inconsistent with the existence of a contract, are acquiesced in by the other party."[11]

After learning of the drainage problems that were discovered at the project site, Asphalt Solutions began working directly with BC Adnoh Holdings to update the paving plans. Once it was identified what additional asphalt work would be needed, Asphalt Solutions did not request that a change order be prepared pursuant to the subcontract. Instead, Asphalt Solutions sent two proposals directly to BC Adnoh Holdings without copying Associated Construction, the first of which discounted the originally contracted work. Initially working with BC Adnoh Holdings to update the asphalt plans was not an abandonment of the subcontract by Asphalt Solutions. Sending proposals directly BC Adnoh Holdings and ignoring the procedure outlined in the subcontract to make additions to the subcontract, and proposing changes to the cost of the originally contracted work did constitute abandonment. Therefore, the trial court did not err in finding that there was no triable issue of material fact regarding whether there was an enforceable contract between Asphalt Solutions and Associated Construction.

Having determined that summary disposition was properly granted by the trial court on the basis of abandonment, we find it unnecessary to address Asphalt Solutions' alternative bases of error: waiver, impossibility and mutual rescission.

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[7] *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000) (citation omitted).

[8] *Ritchie-Gamester*, 461 Mich at 76-77.

[9] *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995).

[10] *Dault v Schulte*, 31 Mich App 698, 701; 187 NW2d 914 (1971) (citation omitted).

[11] *Id.* (citation omitted).

Asphalt Solutions also argues that the trial court erred in dismissing Asphalt Solutions' claim for tortious interference with a contract. We disagree.

"In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy."[12] Asphalt Solutions asserts that its claim against BC Adnoh Holdings was for "tortious interference with a contract or a business relationship or expectancy." Asphalt Solutions' complaint, however, clearly alleges tortious interference with a contractual relationship. "The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant."[13] As explained above, the subcontract between Asphalt Solutions and Associated Construction was unenforceable. As such, there was no contract and, as a result, no breach. Therefore, the trial court did not err in finding that there was no triable issue of material fact regarding whether BC Adnoh Holdings tortiously interfered with the subcontract between Asphalt Solutions and Associated Construction.

Last, Asphalt Solutions argues that the trial court erred in dismissing Asphalt Solutions' claim against Associated Construction and BC Adnoh Holdings for concert of action. We disagree.

"A plaintiff may proceed on a theory of concert of action if he or she can prove 'that all defendants acted tortiously pursuant to a common design.'"[14] "Express agreement is not necessary, and all that is required is that there be a tacit understanding."[15] "[T]o state a cause of action, a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed."[16]

Asphalt Solutions contends that Associated Construction and BC Adnoh Holdings acted tortiously with a common design when BC Adnoh Holdings hired Globe Construction and Associated Construction terminated the subcontract it had with Asphalt Solutions. Because the

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[12] *Health Call of Detroit v Atrium Home & Health Care Svcs, Inc*, 268 Mich App 83, 89; 706 NW2d 843 (2005).

[13] *Id.* at 89-90.

[14] *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985) (citation omitted).

[15] *Id.* (citation omitted).

[16] *Id.* (citation omitted).

subcontract was unenforceable before BC Adnoh Holdings decided to use Globe Construction for the asphalt work, a concert of action claim cannot be maintained.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto